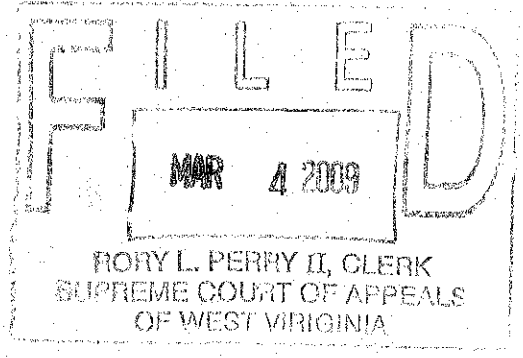
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**




**No. 34717**

HOWARD WRENN and SANDRA BELCHER, as Natural Parents and Co-Administrators of the ESTATE OF MATTHEW WRENN, and ANGELIA HARPER, as Natural Mother and Administrator of the ESTATE OF JUSTIN JANES,

Appellants,

v.

THE WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Appellee.

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# BRIEF OF APPELLANTS

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## I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This litigation involves the interpretation and application of a certain restrictive endorsement, Endorsement No. 7, to the West Virginia Department of Transportation, Division of Highways' (hereinafter "DOH") liability insurance policy. Appellants Howard Wrenn and Sandra Belcher, as natural parents and co-administrators of the Estate of Matthew Wrenn, and Angelia Harper, as natural mother and administrator of the Estate of Justin Janes, brought this action seeking accountability of the DOH for its negligent failure to perform its duty to inspect and make safe a certain section of its right of way where their sons met their demise. The Circuit Court of Wyoming County, West Virginia (Judge Hrko presiding) in the civil action styled Howard Wrenn and Sandra Belcher, as Natural Parents and Co-Administrators of the Estate of Matthew Wrenn, and Angelia Harper, as Natural Mother and Administrator of the Estate of Justin Janes v. The West Virginia Department of Transportation, Division of Highways, Wyoming County Civil Action No. 08-C-93, entered a ruling that the Circuit Court of Wyoming County lacks subject matter jurisdiction over the claims asserted by Plaintiffs. The Circuit Court determined that there is no applicable insurance coverage under the State of West Virginia's Insurance Policy and, as such, the DOH is entitled to sovereign immunity under the West Virginia Constitution.

This appeal challenges the Circuit Court's ruling in that it erroneously interpreted Endorsement No. 7 broadly, when it is well-settled that exclusionary language in an insurance policy is to be strictly construed. In applying its broad interpretation, the Court erred in holding that the DOH is entitled to sovereign immunity because of Endorsement No. 7, even though the restrictive endorsement does not specifically exclude the DOH from liability for its negligent "failure to inspect" and negligent "failure to make safe" its rights of way. This appeal also challenges the Circuit Court's refusal to recognize that Endorsement No. 7 violates West Virginia law and is void as being against public policy because the effects of such a restrictive endorsement is contrary to the mandates of our legislature.

## II. STATEMENT OF FACTS

### A. Background

On the evening of November 26, 2007, Matthew Wrenn and Justin Janes were traveling in a single vehicle on County Route 35/1, also known as Devil's Fork Road, which traverses Raleigh and Wyoming counties (hereinafter "Devil's Fork Road"), on their way back home from a day long hunting trip. As the two young men rounded an "S" curve approximately one (1) mile up Devil's Fork Road, where the roadway crosses several culverts, their vehicle dropped off the edge of the road and overturned into a deep,

washed-out, impoundment of water causing both young men to perish by drowning.

The section of Devil's Fork Road in question has been the site of numerous accidents, one of which claimed the life of another motorist just months prior to the subject crash. This particular section of road consists of multiple, sharp and dangerous "S" curves which open up to a single-lane bridge that crosses several steel culverts. The bridge itself holds no shoulder or guardrail, and is devoid of signage, fog lines, edge lines or any other markings to protect motorists from an approximate fifteen foot (15') vertical plunge into a deep impoundment of water that had formed on the DOH's right of way due to washing out and excess debris. Additionally, the roadway leading up to the crossing is also narrow and unlined and is likewise devoid of any signage to warn of the dangerous conditions that lie ahead when approaching the single-lane bridge from either direction.

At all times relevant, the DOH had designated its District No. 10 (which encompasses McDowell, Mercer, Raleigh, and Wyoming counties) for the oversight and carrying out of its work and responsibilities for Devil's Fork Road. Such responsibilities included the duty to inspect, repair, maintain, attend to and make reasonably safe for the motoring public, the DOH's rights of way along Devil's Fork Road, including but not

limited to all bridges, culverts, streams and waterways within and alongside such road and rights of way. Upon information and belief, Defendant DOH had prior notice of the existence of the dangerous conditions on this particular section of Devil's Fork Road due to numerous accidents which had occurred there and the outcries of local citizens to make the right of way and bridge safe. Just months prior to the subject accident, another motorist died at this very location when his vehicle left the road and crashed into the impoundment of water below and, shortly before that, a Sheriff's Deputy veered off of the road and into the impoundment of water. Moreover, local citizens had contacted the DOH prior to the subject crash and asked one or more officials to come to the scene, inspect it and take such measures as were required to eliminate or minimize the hazards presented by this dangerous section of roadway and the deep impoundment of water that had formed below. The DOH failed to respond to the public outcries. As a direct and proximate result of the DOH's negligent failure to inspect and make safe these dangerous conditions, Devil's Fork Road claimed two more lives; namely, the lives of Matthew Wrenn and Justin Janes.

**B. Procedural History**

Appellants filed their *Complaint* on April 18, 2008 asserting, among other things, that the accident in question was directly and proximately caused by the DOH's negligent failure to

inspect, repair, maintain, attend to and make reasonably safe a particular section of Devil's Fork Road and the DOH's rights of way along said road. Additionally, Appellants prayed for a declaratory judgment against the DOH, which requested the following:

> In the event that the defendant invokes the exclusion contained under "Endorsement #7," Plaintiffs seek a declaratory judgment determination by the Court declaring that the same is null and void as being, unsigned, vague, ambiguous, unconscionable and against public policy and laws of the State of West Virginia.

See, *Complaint*, Para. 18.

Endorsement No. 7 at issue in this case provides as follows:

> It is agreed that the insurance afforded under this policy does not apply to any claim resulting from the ownership, design, installation, maintenance, location, supervision, operation, construction, use, or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warning markers, markings, guardrails, fences, or related or similar activities or things but it is agreed that the insurance afforded under this policy does apply (1) to claims of "bodily injury" or "property damage" which both directly result from and occur while employees of the State of West Virginia are physically present at the site of the incident at which the "bodily injury" or "property damage" occurred performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others) and (2) to claims of "bodily injury" or "property damage" which arise out of the maintenance or use of sidewalks which abut buildings covered by the policy.

The DOH filed a *Motion to Dismiss* alleging that the Circuit Court lacked subject matter jurisdiction because the West

Virginia Constitution prohibits the State from being sued unless there is applicable liability insurance coverage. The DOH claimed that, as applied to the case at bar, there is no insurance coverage due to the restrictive Endorsement No. 7 referred to above. Specifically, the DOH maintained that since workers were not physically present at the time and place of the incident, Endorsement No. 7 precludes insurance coverage and renders the DOH immune from liability. The DOH also contended that the *Complaint* should be dismissed for failure to join an indispensable party, to-wit: the West Virginia Board of Risk and Management ("BRIM"), an issue which was not ruled upon during the hearing.

**III. ASSIGNMENTS OF ERROR**

A. The Circuit Court erred in finding the DOH entitled to sovereign immunity, based upon its broad interpretation of Endorsement No. 7 and its specific finding that said Endorsement excludes coverage for the DOH's negligent failure to inspect and make safe its roads, bridges, etc.

B. The Circuit Court erred by failing to recognize that Endorsement No. 7 is void for being contrary to West Virginia law and for being against public policy.

**IV. POINTS AND AUTHORITIES RELIED UPON**

## V. DISCUSSION OF LAW

### A. Standard of Review

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syllabus point 2, State *ex rel.* McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995). Additionally, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus point 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995). "A determination of the existence of public policy in West Virginia is a question of law ..." and, likewise, is reviewed de novo. Syllabus point 1, [in part,] Cordle v. General Hugh Mercer Corp., 174 W. Va. 321, 325 S.E.2d 111 (1984).

"In conducting a de novo review, we apply the same standard applied in the circuit court." Forshey v. Jackson, 671 S.E.2d 748 W. Va. (2008). "Generally, a motion to dismiss should be granted only where 'it is clear that no relief could be

granted under any set of facts that could be proved consistent with the allegations.'" Id. (quoting Murphy v. Smallridge, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996)) (additional citation omitted). "For this reason, motions to dismiss are viewed with disfavor, and we counsel lower courts to rarely grant such motions." Id. (citing John W. Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W. Va. 603, 605-06, 245 S.E.2d 157, 159 (1978)). Accordingly, "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." Id.

**B. The Circuit Court erred in finding the DOH entitled to sovereign immunity, based upon its broad interpretation of Endorsement No. 7 and its specific finding that said Endorsement excludes coverage for the DOH's negligent failure to inspect and make safe its roads, bridges, etc.**

Section 29-12-1 *et seq.* of the West Virginia Code requires the State Board of Risk and Insurance Management (the "Board") to procure liability insurance on behalf of the State. Once insurance is procured, W. Va. § 29-12-5(a)(4) specifically provides that "the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits." "Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against

the State." Pittsburgh Elevator v. West Virginia Board of Regents, 172 W. Va. 743, 756, 310 S.E.2d 675, 689 (1983).

The DOH conceded in its *Motion to Dismiss* that it is insured by a policy of liability insurance for "certain acts of negligence". *Q.v.*, ¶ 3. The State's liability policy, then in effect, Policy Number RMGL 159-52-62, specifically provides liability insurance coverage for any "Wrongful Act" of the insured. Coverage E, § 4 of the Policy defines a "Wrongful Act" as "any actual or alleged act, breach of duty, neglect, ... or omission by the 'insured(s)' in the performance of their duty ...." The DOH alleges that the Policy's coverage is restricted by language of a certain "Endorsement No. 7" thereto, which precludes coverage for the allegations set forth in the *Complaint*. As such, the DOH alleges that it is constitutionally immune from suit under Article VI, § 35 of the West Virginia Constitution and the Circuit Court lacks subject matter jurisdiction to hear the case.

Paragraph 17 of the *Complaint* explicitly states that "Plaintiffs seek a recovery herein under and up to the limits of the State's liability insurance coverage." This assertion alone is enough to lift the constitutional bar to suit against the State and allow the suit to move forward to determine if the State's insurance coverage is applicable to this cause of action. This is not, however, how the trial court interpreted the law.

It instead focused its attention on the issue of whether the cause of action alleged, which arose from the negligent failure of the DOH to inspect and make reasonably safe its rights of way, fell within the coverage of the State Policy, and, specifically, whether Endorsement No. 7 excluded coverage for the accident at issue in this case. In doing so, the trial court broadly interpreted Endorsement No. 7 to exclude from coverage all claims of negligence against the DOH when workers are not physically present.

On its face, the language of the restrictive Endorsement No. 7 does not specifically exclude coverage for the DOH's "failure to inspect" and "failure to make reasonably safe" its rights of way, which includes the waterways within its rights of way. Accordingly, coverage exists under the State's liability policy for such omissions and/or commissions on the part of the DOH and, in particular, exists relative to the claims set forth in the Plaintiffs' *Complaint*.

There are well-settled overriding principles when it comes to insurance policy language, restrictive endorsements, and claims of governmental immunity. First, "[w]here the policy language involved is exclusionary, it will be *strictly construed against the insurer* in order that the purpose of providing indemnity not be defeated." (Emphasis added). National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 740, 356 S.E.2d 488, 494 (1987). Second, "the general rule of construction in

governmental tort legislation cases *favors liability, not immunity*. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail." [Emphasis added]. Marlin v. Bill Rich Const., Inc., 198 W. Va. 635, 643, 482 S.E.2d 620, 628 (1996).

Paragraph 5 of the *Complaint* states "[t]hat at all times material herein, the DOH had a duty to inspect ... and make reasonably safe for the motoring public ... Devils's Fork Road and the DOH's rights of way along said road, including but not limited to all bridges, culverts, streams and waterways within and alongside such road and rights of way." Also, Paragraph 16 sets forth "[t]hat the accident in question was directly and proximately caused by the DOH's negligent failure to inspect ... and make reasonably safe its rights of way, including but not limited to all bridges, culverts, streams and waterways within and alongside such ... rights of way." Plaintiffs sufficiently pled that Defendant DOH had a duty to inspect and make safe and negligently failed to do so.

Furthermore, Plaintiffs sufficiently pled that public outcries made Defendant DOH aware of the dangerous conditions and that it had a duty to inspect the area and make it safe for the motoring public. The West Virginia Department of Highways Maintenance Manual § 01.03, specifically states that "[i]t is the

established policy of the Department to investigate and make personal contact for all citizens' requests for assistance ...", that there is a "detailed procedure for handling the Citizens' Requests for Assistance ...", and that "[a]ll Maintenance Supervisory personnel must be aware of this very important portion of the Maintenance Program ...." Paragraph 15 of the *Complaint* states that "months before the accident involving Matthew Wrenn and Justin Janes, the DOH was asked by one or more local citizens to come to the scene, inspect, and take such measures as were required to eliminate or minimize the hazards presented by this dangerous section of roadway." This refers, in part, to an incident where a local citizen made an appointment with a DOH official to meet at the subject bridge and the DOH official failed to show up at that appointment. (Tr. at 9, line 24.) This breach of duty, neglect, and omission of the DOH also constitutes a "Wrongful Act" as defined in the State's liability policy, *supra*, that is not specifically excluded by Endorsement No. 7. Endorsement No. 7, strictly construed, does not specifically exclude from coverage the assertions set forth in the Plaintiffs' *Complaint*. Accordingly, such assertions are covered by the State's Policy.

The holding by the trial court below directly conflicts with other circuit courts that have considered this very issue and concluded that Endorsement No. 7 does not exempt from

coverage a cause of action based upon the failure to inspect or failure to make safe.

In a Wayne County case, Titchnell v. The West Virginia Department of Transportation, Division of Highways, Wayne County Civil Action No. 03-C-266, Judge Darrell Pratt concluded that "[b]ecause the duty to inspect is not specifically excluded by the language of endorsement #7, Plaintiffs' claim is covered by State insurance."[1] A copy of this Order is attached as Exhibit A to the *Plaintiffs' Response to Defendant The West Virginia Department of Transportation, Division of Highways' Motion to Dismiss Plaintiffs' Claims.* Likewise, finding the Titchnell decision persuasive, Judge James P. Mazzone of the Brooke County Circuit Court reached the same conclusion in West v. West Virginia Department of Transportation, Division of Highways, *et. al.*, Brooke County Civil Action No. 06-C-61 (holding that the language of the endorsement does not exclude from liability the Division of Highways alleged failure to inspect.) A copy of this Order is attached as Exhibit B to the *Plaintiffs' Response to Defendant The West Virginia Department of Transportation, Division of Highways' Motion to Dismiss Plaintiffs' Claims.* Similarly, in a Marshall County case, Werfele v. Kelly Paving,

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[1] The DOH subsequently filed a Petition for Appeal on this issue which was unanimously refused by this Court on May 11, 2006. Ronda Titchnell and Paul Titchnell v. The West Virginia Department of Transportation Division of Highways, No. 060538.

Inc., *et. al.*, Marshall County Consol. Civil Action Nos. 07-C-58M and 05-C-306M, the Court, in deciding the validity of an unsigned Endorsement No. 7, strictly construed the language of the endorsement and held that "[e]ven if Endorsement No. 7 was signed, it does not exclude coverage for the plaintiff's claims ... that the D.O.H. failed to secure, attend to, and make safe the D.O.H.'s hillside property ...." A copy of this is attached as Exhibit A to Appellant's *Petition for Appeal*.

Plaintiffs' *Complaint* asserts that Defendant DOH had a duty to inspect and make safe the subject section of roadway, its rights of way along said roadway, including but not limited to all bridges, culverts, streams and waterways within and alongside such road and rights of way, and negligently failed to do so, even after requested to do so by the public. Jurisdiction over this action was and is proper in the trial court since Endorsement No. 7 does not specifically exclude the DOH's negligent failure to inspect the site in question and make it reasonably safe. Therefore, the trial court should have determined, as the Wayne County, Brooke County and Marshall County Circuit Courts did, that Endorsement No. 7 does not apply and that insurance is afforded relative to the Plaintiffs' claims under the policy in question.

**C. The Circuit Court erred by failing to recognize that Endorsement No. 7 is void for being contrary to West Virginia law and for being against public policy.**

In addition to the preceding argument, Plaintiffs alleged in Paragraph 18 of their *Complaint* that the exclusionary provision relied upon by the Defendant DOH to deny insurance coverage is "unsigned, vague, ambiguous, unconscionable and against public policy." The Circuit Court below dismissed this argument as being out of hand, since "this Court doesn't make public policy - at least that has always been my policy. Public policy is made by the Supreme Court and more often the legislature." (Tr. at 14, line 11.)

As previously discussed, the State typically enjoys Constitutional immunity from suit. However, our Legislature has carved out an exception to this sovereign immunity by allowing suits against the State when the funds sought and obtained will come from insurance coverage. To that end, our Legislature has required, by statute, the State Board of Risk and Insurance Management ("BRIM") to "secure reasonably broad protection against loss, damage or liability to state property and on account of state activities and responsibilities by proper, adequate, available and affordable insurance coverage." W. Va. Code § 29-12-5(a)(2) states, in pertinent part, as follows:

> The board shall endeavor to secure *reasonably broad protection* against loss, damage or liability to state property and *on account of state activities and responsibilities* by proper, adequate, available and affordable insurance coverage and through the introduction and employment of sound and accepted principles of insurance, methods of protection and principles of loss control and risk.

(Emphasis added).

In addition, not only has our State's Legislature required BRIM to secure, on behalf of our State, proper and adequate insurance coverage, our Legislature has also expressed the strong desirability of maintaining insurance coverage by the State in W. Va. Code § 29-12-1:

> Recognition is given to the fact that the state of West Virginia owns extensive properties of varied types and descriptions representing the investment of vast sums of money; that *the state and its officials, agents and employees engage in many governmental activities and services* and incur and undertake numerous governmental responsibilities and obligations; that such properties are subject to losses, damage, destruction, risks and hazards and such activities and responsibilities are subject to liabilities *which can and should be covered by a sound and adequate insurance program.*

(Emphasis added).

Furthermore, in Russell v. Bush & Burchett, Inc., 210 W. Va. 699, 706, 559 S.E.2d 36, 43 (2001), this Court recognized that W. Va. Code § 29-12-1:

> *evidences a remedial legislative purpose* that the State establish mechanisms that will *assure that the State is financially responsible and accountable for injuries occasioned by culpable State action.* That remedial purpose must be given substantial weight—along with the foregoing principles that *narrowly construe* exclusionary policy language and *favor governmental tort liability* – in examining, applying, and interpreting the exclusionary language in the DOH policy.

(Emphasis added).

Thus, despite any immunity conferred upon our State by the Constitution, our State Legislature has made clear through

statutory pronunciation that BRIM is required to procure proper and adequate insurance for the State so that the State and all of its agencies, including the Defendant DOH, has protection so that it can be financially responsible and accountable for injuries occasioned to its citizens by culpable State action. Culpability is defined as "blameworthy; involving the breach of a duty." BLACK'S LAW DICTIONARY 167 (2d Pocket ed. 2001). This is precisely what the Plaintiffs are claiming against the DOH. No one else but the DOH is to blame for the blatant disregard for the public's safety by constructing a bridge with no berm, warning signs, edge-line markings, or guardrail, 15 feet above a waterway, and allowing the waterway to form a deep impoundment of water below. Moreover, no one else but the DOH is to blame for the death of the individuals herein due to its breach of duty to the public to respond to the pleas to inspect the bridge and deep impoundment of water beside the bridge, make it safe, and prevent further tragedy.

In discussing governmental accountability, Justice Starcher, in his concurring opinion in Blessing v. Nat'l Eng'g & Contracting Co., 222 W. Va. 267, 664 S.E.2d 152 (2008), stated that "[w]hen the State through its own negligence has injured an individual, it is precisely the State that is in a better position to spread the costs of the damages it inflicted - rather than a private citizen, who is left with no remedy." Justice

Starcher rendered his opinion favoring greater government accountability, regardless of whether insurance is available, and in opposition to the "archaic constitutional language" establishing the sovereign immunity jurisprudence of our State. Justice Starcher also noted that "[w]ithout fear of liability, the State has little incentive to be careful in its actions, because any injuries resulting from a failure to perform its duties are of no financial consequence." This is all too clear in the case at bar. As previously discussed, the State, in performing its primary function, created a dangerous condition by erecting such a bridge with no guardrail, caused the dangerous condition to worsen by allowing a deep impoundment of water to form from wash-out and debris, failed to make it safe, and is now claiming it cannot be held liable for such. Nothing could be more contrary to the public policy of this State.

This Court has already opined, in dicta, that the failure to insure a state agency against negligence resulting from the agency's primary function is suspect. In Ayersman v. Division of Environmental Protection, 208 W. Va. 544, 542 S.E.2d 58 (2000), a landowner brought an action against the Department of Environmental Protection (DEP) to recover for damage from flooding allegedly caused by a negligent mine reclamation project. The DEP countered that it was immune from suit since its insurance policy provided no liability coverage. The circuit

court agreed and the DEP was dismissed on summary judgment. The landowner appealed, and this Court ultimately reinstated the case on the ground that the lower court's order lacked sufficient findings of fact and conclusions of law to permit meaningful review. Nonetheless, the Court took the opportunity to comment on the DEP's argument regarding the insurance exclusion. That opinion states:

> We note that the reclamation of abandoned mine sites is a primary function of DEP.
>
> > [I]t is the intent of the Legislature by this article to vest jurisdiction and authority in the director of the division of environmental protection to maintain program approval by, and receipt of funds from, the United States department of the interior to accomplish the desired restoration and reclamation of our land and water resources.
>
> W. Va. Code § 22-2-2 (1994). Thus, DEP is in the unique position that it is charged with the restoration of sites left abandoned by others; DEP does not operate plants, factories, or mines of its own that might result in a "governmental direction or request ... to clean up ... pollutants." To the contrary, DEP actually is a government entity that directs or requests others to clean up pollutants.
>
> Thus, the exclusion at issue seems particularly ill-suited for a policy written for the DEP. While we do not find it necessary to make a detailed analysis of the policy to resolve this appeal, *we are skeptical of any policy language that purports to exclude a primary function of the insured.*

208 W. Va. at 546, 542 S.E.2d at 60, fn.2. [emphasis added].

The instant case is precisely the situation this Court cast doubt upon in Ayersman. The first duty assigned to the Commissioner of the Division of Highways is to "[e]xercise

general supervision over the state road system and the construction, reconstruction, repair, and maintenance of state roads and highways." W. Va. Code § 17-2A-8(1). By its terms, restrictive Endorsement No. 7 seeks to eliminate coverage for the DOH's key functions of maintaining the State's road systems, guardrails, waterways, or rights of way, and thereby precludes the DOH from maintaining reasonable protection so that it can be financially responsible and accountable for injuries occasioned to its citizens by culpable State action. Again, restrictive Endorsement No. 7, in pertinent part, provides as follows:

> it is agreed that the insurance afforded under this policy does apply (1) to claims of 'bodily injury' or 'property damage' which both directly result from and occur while employees of the State of West Virginia are physically present at the site of the incident at which the 'bodily injury' or 'property damage' occurred performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others.)

As the Defendant DOH represented and the trial court held, the above restrictive endorsement means that the DOH is only financially responsible and accountable for injuries it causes to its citizens when a State DOH employee is physically present at the site when the injury happens. Given the fact that the DOH always uses independent contractors to do its guardrail installation and repair work, there will never be a State DOH employee physically present at the site of the incident when an injury happens as a result of "culpable State action." Thus,

Endorsement No. 7 violates the above-referenced statutes and the Legislature's mandate that the State be "financially responsible and accountable for injuries occasioned by culpable State action." Moreover, under this analysis DOH could never be culpable for failing to properly maintain the State's roadways, its primary reason for existing.

"In construing any insurance policy, it is appropriate to begin by considering whether the policy language is in accord with West Virginia law." Adkins v. Meador, 201 W. Va. 148, 153, 494 S.E.2d 915, 920 (1997). "The terms of the policy should be construed in light of the language, purpose and intent of the applicable statute. Provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy." Gibson v. Northfield Ins., 631 S.E.2d 598 (W. Va. 2005), citing syl. pt. 2, Universal Underwriters Ins. Co. v. Taylor, 185 W. Va. 606, 408 S.E.2d 358 (1991); syl. pt. 1, Bell v. State Farm Mut. Auto Ins. Co., 157 W. Va. 623, 207 S.E.2d 147 (1974); syl. pt. 2, Johnson v. Continental Casualty Co., 157 W. Va. 572, 201 S.E.2d 292 (1973).

Thus, by attempting to invoke the exclusionary provisions of Endorsement No. 7, the DOH is attempting to exclude from coverage that which is its primary function, the maintenance of the State's roads and rights of way. Such an attempt violates the public policy of this State. Accordingly, the trial court

erred by not recognizing the restrictive language of Endorsement No. 7 as void.

**VI. RELIEF PRAYED FOR**

For the foregoing reasons, Appellants pray that this Court enter an order that:

1. Vacates the Wyoming County Circuit Court's grant of the DOH's *Motion to Dismiss;*

2. Vacates the Wyoming County Circuit Court's ruling that the DOH is entitled to sovereign immunity for the claims set forth in Plaintiffs' *Complaint;*

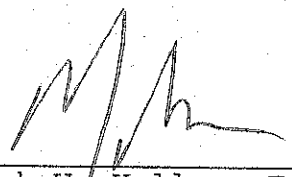
3. Decrees that Endorsement No. 7 to the State's liability insurance policy is to be strictly construed;

4. Decrees that Endorsement No. 7 to the State's liability insurance policy does not exclude coverage for the DOH's negligent "failure to inspect" and "failure to make safe" its rights of way and waterways within its rights of way; and

5. Decrees that Endorsement No. 7 to the State's liability insurance policy is null and void for being contrary to West Virginia law and for being against public policy.

Appellants further request all such other relief as this Court deems just and proper.

Respectfully submitted this 4th day of March, 2009.



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**CERTIFICATE OF SERVICE**

I, Mark W. Kelley, an attorney for Appellants, hereby certify that on March 4, 2009, I served a true and correct copy of the foregoing **"BRIEF OF APPELLANTS"** on the parties hereto via U.S. Mail, first class, postage prepaid, addressed as follows:

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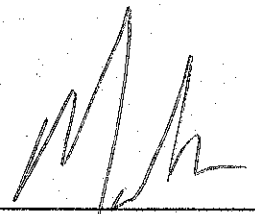

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